

**BEFORE THE NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

DARNALL RANCH INC.,)	
)	
Appellant,)	Case No. 05A 224
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
BANNER COUNTY BOARD OF)	THE BANNER COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Darnall Ranch Inc. ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in a meeting room at the Hampton Inn, in the City of Scottsbluff, Scotts Bluff County, Nebraska, on August 26, 2009. Commissioners Wickersham, Warnes and Salmon were present. Commissioner Wickersham was the presiding hearing officer.

Gary Darnall, President of Darnall Ranch Inc., was present at the hearing. Robert M. Brenner appeared as legal counsel for the Taxpayer.

James L. Zimmerman, County Attorney for Banner County, Nebraska, was present as legal counsel for the Banner County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits, and heard testimony.

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008). The final decision and order of the Commission in the consolidated cases is as follows.

**I.
ISSUES**

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2005, is less than taxable value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board, determining taxable value of the subject property, is unreasonable or arbitrary; and

The taxable value of the subject property on January 1, 2005.

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2005, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

Whether the decision of the County Board, determining the equalized taxable value of the subject property, is unreasonable or arbitrary;

Whether the equalized taxable value of the subject property was determined by the County Board in a manner and an amount that is uniform and proportionate as required by Nebraska's Constitution in Article VIII §1; and

The equalized taxable value of the subject property on January 1, 2005.

II. FINDINGS OF FACT

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeals to maintain them.

2. The parcel of real property to which the above captioned appeals pertain ("the Subject Property") are described in the table below.
3. Taxable value of the subject property placed on the assessment roll as of January 1, 2005, ("the assessment date") by the Banner County Assessor, value as proposed in timely protests, and taxable value as determined by the County Board is shown in the following table:

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Description: All Section 19, Township 19, Range 53, Banner County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value ¹
Agricultural Land	\$201,776.00	\$193,673.00	\$201,776.00
Total	\$201,776.00	\$193,673.00	\$201,776.00

1. The meetings of the County Board held July 12 and July 22, 2005, were declared void in *Wolf v. Grubbs*, 17 Neb.App. 292, 759 N.W.2d 499 (2009). The County Board considered the Taxpayer's protest on July 12 and made its decision on July 19, 2005. (E1:1). The decisions made on July 19, 2005 were based on information obtained at the July 12, 2005 void meeting. The County Board could not consider information obtained at the July 12, 2005 meeting as it decided the Taxpayer's protest. *Alderman v. County of Antelope*, 11 Neb.App. 653 N.W.2d 1 (2002).

4. An Appeal of the County Board's decisions was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summon and duly answered those Notices.
6. The appeal was consolidated for hearing with other appeals of the Taxpayer by order of the Commission.
7. Taxable value of the subject property for the tax year 2005 is:

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Agricultural land \$ 201,776.00

Total \$ 201,776.00.

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in each of the above captioned appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2008).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).
4. “Actual value, market value, and fair market value mean exactly the same thing.” *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2004).
7. Agricultural land and horticultural land shall be valued for purposes of taxation at eighty percent of its actual value. Neb. Rev. Stat. §77-201 (2) (Cum. Supp. 2004).
8. Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure." Neb. Rev. Stat. §77-1359 (1) (Reissue 2003).
9. "Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution." *Neb. Const.*, Art. VIII, §1.
10. Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).
11. The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

12. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. See *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
13. Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).
14. Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).
15. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
16. If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).

17. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
18. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
19. The presumption disappears if there is competent evidence to the contrary. *Id.*
20. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
21. Proof that the order, decision, determination, or action appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g., *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
22. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
23. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).

24. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
25. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 638 N.W.2d 881 (2002).
26. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
27. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
28. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982) (determination of equalized taxable value) *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

IV. ANALYSIS

The subject property is a parcel of unimproved agricultural land and horticultural land.

The Taxpayer asserted that it was entitled to an order determining that taxable value of the subject property, as determined for the prior year, is the taxable value of the subject property for the tax year 2005. The Taxpayer relied on the fact that notice of the County Board's decision made on July 19, 2005 was mailed on July 29, 2005. Applicable law did not require mailing of a notice of the County Board' decision until August 2, 2005. Neb. Laws, LB 973 §33 effective January 1, 2005. The Taxpayer is not entitled to relief for failure to give timely notice of the County Board's decision.

The Taxpayer also asserted the notice of valuation change it received was defective and that because of the defect it was entitled to an order determining that taxable value of the subject property, as determined for the prior year, is the taxable value of the subject property for the tax year 2005. The County Assessor is required by law to give notice of changes in valuation. Neb. Rev. Stat. §77-1315(2) (Cum. Supp. 2004). The notice must identify the item of real property and state the old and new valuation. *Id.* In addition to the required information, the County Assessor also attached a land inventory showing a total valuation different than the valuation shown in the statutorily required portion of the form. There is no evidence that the valuation change stated in the required portion of the notice was defective. The Taxpayer protested the change in valuation. A protest of valuation waives any defects in the required notice. *C. A. Gamboni v. County of Otoe*, 159 neb. 417, 67N.W.2d 489 (1954). The Taxpayer's contention

that it is entitled to relief because of a defect in the required notice of valuation change is without merit.

The Taxpayer's President testified that in his opinion the taxable value of the subject property for the tax year 2005 was \$193,673. Taxable value for the tax year 2004 was \$193,673. (E20:18). The prior year's assessment is not relevant to the subsequent year's valuation. *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944). *Affiliated Foods Coop v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 428 N.W.2d 201 (1988). The Taxpayer's President testified that the subject property had not been improved in the year 2004. The Taxpayer's President testified that the basis for his opinion was comparison with other sales, that people in the business know value and that no comparison could be made to a single parcel. The Taxpayer's President did not present evidence or analysis of sales on which he might have relied on for his opinion. The Nebraska Supreme Court has observed that "(a)s a general rule the valuation of property for tax purposes by the proper assessing officers should not be overthrown by the testimony of one or more interested witnesses that the values fixed by such officers were excessive or discriminatory when compared with the values placed thereon by such witnesses. Otherwise no assessment could ever be sustained." *Helvey v. Dawson County Board of Equalization*, 242 Neb. 379, 387, 495 N.W.2d 261, 267 (1993).

The County Assessor testified that taxable value of agricultural land and horticultural land in Banner County for the tax year 2005 was determined in a multi step process. A soil survey has been prepared for Banner County. *Soil Survey of Keith County, Nebraska*, United States Department of Agriculture, Natural Resources Conservation Service (1994). The soil survey describes soil types and maps their location within the county. An agricultural land and

horticultural land manual is issued by the Property Tax Administrator for the classification of agricultural land. Neb. Rev. Stat. §77-1361 (Reissue 2003). The agricultural land and horticultural land manual is to divide those lands into categories and subclasses based on soil classification. Neb. Rev. Stat. 77-1362 (Reissue 2003). The soil conversion table is prescribed by a directive issued by the Property Tax Administrator. Directive 99-8 Property Tax Administrator (1999). The County Assessor testified that each qualified sale of agricultural land and horticultural land is analyzed to determine the average value of the land classifications found in the sold parcels. Once the values of various land classifications are determined, those values are applied to acres of land for each classification found in a sold parcel. The resulting value is compared to its sale price. A ratio of assessed value to sale price is determined for each sale based on the proposed value. The assessment to sale ratios are then analyzed to determine if the level of value, indicated by the ratios, meets the standards set by law. The County Assessor testified that for the year 2005 the requirements of law were met by the values she developed and used for each classification of land. A value for each classification of land in a parcel was determined as the number of acres of a classification found in a parcel, multiplied by the per acre value assigned to that classification. The value of each parcel was then determined as the sum of the values assigned to each classification of land found within the parcel. The County Assessor also testified that the values developed for each classification of land were used for the valuation of all agricultural land and horticultural land in the Banner County for tax year 2005.

No evidence was produced indicating that taxable value of the subject property was not equalized with other similar parcels.

As noted above, the County Board could not rely on information it may have obtained at its meeting on July 12, 2005, to make a decision on the Taxpayer's protest. Review by the Commission is de novo. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275 750 N.W.2d 802 (2008). Whatever information the County Board had, or did not have, in making its decision is not material in this proceeding.

On appeal the Commission may consider all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2008). The Taxpayer stated numerous basis for relief in its protest to the County Board. The Commission has considered the evidence presented to it and the issues raised by that evidence. The evidence before the Commission does not show that the decision of the County Board was unreasonable or arbitrary.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining taxable values of the subject property as of the assessment date, January 1, 2005, is affirmed.
2. Taxable value of the subject property, for the tax year 2005, is:

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Agricultural land	<u>\$ 201,776.00</u>
Total	<u><u>\$ 201,776.00.</u></u>

3. This decision, if no appeal is timely filed, shall be certified to the Banner County Treasurer, and the Banner County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2005.
7. This order is effective for purposes of appeal on November 19, 2009.

Signed and Sealed. November 19, 2009.

Nancy J. Salmon, Commissioner

William C. Warnes, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2008), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur in the result.

The analysis above considers two standards of review for review. One standard of review is stated as a presumption found in case law, the other is found as stated in statute. I do not believe consideration of two standards of review are required by statute or case law.

The Commission is an administrative agency of state government. See *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. *Id.* The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (Supp. 2007). In general, the Commission may only grant relief on appeal if it is shown that the order, decision, determination, or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Cum. Supp. 2008).

The Commission is authorized to review decision of a county board of equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of county board of equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.* A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See *State v. Savage*,

65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See *id.* In 1959, the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g., *Ideal Basic Indus. V. Nuckolls Cty. Bd. Of Equal.*, 231 Neb. 653, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. See, e.g., *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by the district court; one statutory requiring a finding that the decision reviewed was unreasonable

or arbitrary, and another judicial requiring a finding that a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001 section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016(8) requires a finding that the decision being reviewed was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008). The Supreme Court has stated that the presumption which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. V. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

The possible results from application of the presumption as a standard of review and the statutory standard of review are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. The second possibility does not therefore allow a grant of relief even though the presumption is overcome because the statutory standard remains. See *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445

(2003). The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, and the statutory standard remains after the presumption has been overcome. See *id.* The burden of proof to overcome the presumption is competent evidence. *Id.* Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g., *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York*, *supra*. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

Use of the presumption as a standard of review has been criticized. See G. Michael Fenner, *About Presumptions in Civil Cases*, 17 Creighton L. Rev. 307 (1984). In the view of that author, the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or

contrary to constitutional or statutory provisions governing taxation. See *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the difficulties inherent in the application of two standards of review. It is within that framework that I have analyzed the evidence.

Wm R. Wickersham, Commissioner